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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Section 6331(a) of the Internal Revenue Code authorizes the IRS to collect unpaid taxes by levy upon "all property and rights to property * * * belonging to" a delinquent taxpayer. The question presented is whether, where a delinquent taxpayer has an unrestricted right under his contract with a bank and state banking law to withdraw without notice to his co-depositors the full amount on deposit in a joint checking or savings account, the IRS has a corresponding right to levy on the account in satisfaction of that taxpayer's tax liability, or whether (as the court of appeals held) the IRS must negate or quantify the potential claims of all the delinquent taxpayer's co-depositors as a precondition to a valid administrative levy.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 726 F.2d 1292. The opinion of the district court (App., *infra*, 18a-29a) is reported at 554 F. Supp. 110.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 30a) was entered on January 31, 1984. A timely petition for rehearing was denied on April 30, 1984 (App., *infra*, 31a). On July 21, 1984, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including September 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6321, 6331, 6332, 7403 and 7426 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Ark. Stat. Ann. §§ 67-521, 67-552 (1980) are set out in a statutory appendix (App., *infra*, 32a-38a).

STATEMENT

1. Roy Reeves owes $857 in federal income taxes for 1977, based upon an assessment made against him on December 10, 1979 (App., *infra*, 2a). He has a checking account and a savings account at the National Bank of Commerce, a banking corporation doing business in Pine Bluff, Arkansas (*id.* at 1a-3a). Both accounts are held in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves" (*id.* at 3a).[1] Each of the three, Roy, Ruby and Neva, is authorized to withdraw money up to the full amount of the outstanding balance in each account (*id.* at 3a; Stip. 2). It is not known which of the three co-depositors owned the funds before the funds were deposited in the accounts, or in what proportion (App., *infra*, 3a; Stip. 1). It was stipulated below that no evidence would be submitted as to the co-depositors' respective claims, inter sese, to the funds (App., *infra*, 3a; Supp. Stip. 1).

Section 6331(a) of the Code[2] provides that the IRS may collect the taxes of a delinquent taxpayer "by levy upon all property and rights to property * * * belonging to such person." Section 6332(a) in turn provides that anyone "in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" shall surrender such property or rights upon demand of the IRS. Pursuant to these Sections, the Commissioner, in an effort to collect Roy's unpaid taxes, served a notice of levy against the bank with respect to the two accounts described above (App., *infra*, 18a). On the date the notice of levy was served—June 13, 1980—the balance in the checking account was $322 and the balance in the savings account was $1,242 (App., *infra*, 3a). The IRS demanded that the bank pay over to it any sums owing to Roy up to a total of $857.

2. The bank refused to comply with the levy, contending that it did not know how much of the money on deposit belonged to Roy, as opposed to Ruby or Neva (App., *infra*, 1a). The government then brought this action against the bank in the United States District Court for the Eastern District of Arkansas, pursuant to Code Section 6332(c)(1). That Section provides that "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the [IRS], shall be liable in his own person" up to the value of the property or rights not surrendered or the amount of tax due, whichever is less.

The case was submitted to the district court on the bank's motion to dismiss the complaint and on cross-motions for summary judgment (App., *infra*, 18a). The district court granted the bank's motion to dismiss, concluding (*id.* at 23a) that due process mandates "something more" than the Code's levy procedures provide. In the court's view, the Due Process Clause of the Fifth Amendment obligates the IRS, when levying on property in a joint account, to identify the delinquent taxpayer's co-depositors and provide them with notice and an opportunity to be heard (App., *infra*, 24a-25a). The district court outlined the procedures it believed the Constitution requires the IRS to follow when levying on joint bank accounts.[3]

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[1] Although the record does not reveal how the three co-depositors are related to one another, the IRS understands that Neva is Roy's wife and that Ruby is his mother.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[3] The district court held that a bank, upon receiving a notice of levy, should freeze the assets in the account and provide the

3. The court of appeals affirmed (App., *infra*, 1a-17a). Although it expressed no opinion on the constitutional issues decided by the district court (*id.* at 2a, 17a), it reached the same result as a matter of statutory construction. In the court of appeals' view, the IRS, when levying on a joint bank account, must bear the burden of proving "the actual value of the delinquent taxpayer's interest in [the] jointly owned property" (*id.* at 2a). Since "the rights of the various parties" to the funds at issue here had not yet been determined (*id.* at 17a), the court concluded that the government had not shown the bank to be in possession of "property [or] rights to property * * * belonging to" Roy, as Section 6331(a) requires.

The Eighth Circuit acknowledged that, under Arkansas banking law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (App., *infra*, 6a). The court also found some force in the argument that "the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy" (*id.* at 7a). The court nevertheless refused to accept the

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IRS with the names of all co-depositors (App., *infra*, 24a-25a). The IRS would then be required to notify the co-depositors and give them a reasonable time period "in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest [claimed] in the joint account" and the ground of their claim (*id.* at 25a). If the bank, on the basis of the affidavits, "believe[d] that a genuine dispute exist[ed] as to the legality of any ownership claim" made by the co-depositors, "it [might] refuse to surrender any portion of the funds so claimed" (*id.* at 29a). The IRS would then be forced to bring suit to enforce the levy, at which point "due process would require that the government * * * name the co-depositors as co-defendants with the bank" (*id.* at 25a).

IRS' contention that it "st[ood] in Roy's shoes and could do anything Roy could do," pointing out that, "at least as to ordinary creditors, [that was] not the law of Arkansas." Under Arkansas garnishment law, the court noted, the Arkansas courts had "rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account." Rather, a creditor in an Arkansas garnishment proceeding is required to "join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account." *Ibid.*[4] The court of appeals believed that a similar rule should apply in administrative levy proceedings brought under the Internal Revenue Code, and accordingly concluded that the government could not prevail without negating or quantifying the claims that Ruby and Neva might have to the funds in question.

In upholding the bank's refusal to honor the levy, the court of appeals expressed the belief that IRS administrative levies are "not normally intended for use as against property in which third parties have an interest" or "against property bearing on its face the names of third parties" (App., *infra*, 17a). The government's proper remedy in such situations, in the court of appeals' view, was to "bring[ ] suit to foreclose its lien under [I.R.C. §] 7403, joining as defendants the * * * co-owners of the account" (*ibid.*). The court appeared to agree with the government's contention that "a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy" (App., *infra*,

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[4] The court observed that "[t]he rights of [bank co-depositors] *inter sese* are not determined by the cited Arkansas statutes," but rather "depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners" (App., *infra*, 6a-7a).

11a). But the court concluded that "the better reasoning" lay with the Sixth Circuit's decision in *United States* v. *Stock Yards Bank*, 231 F.2d 628 (1956), a case involving an IRS levy on co-owned United States savings bonds (App., *infra*, 8a-11a, 14a-15a).

The government's petition for rehearing with suggestion of rehearing en banc was denied (App., *infra*, 31a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal tax law in a way that conflicts with the decisions of this Court and of at least three other circuits. The decision below is erroneous, effectively preventing the IRS from levying on property even though that property is freely accessible to the delinquent taxpayer and thus could be used by him for payment of his taxes. The question presented has great administrative importance and involves substantial amounts of revenue, for the IRS serves notices of levy on several hundred thousand joint bank accounts each year. Review by this Court is therefore appropriate.

1. a. The Internal Revenue Code affords the government two principal options for collecting unpaid taxes. The taxpayer's failure to pay creates in favor of the United States a lien that attaches to "all property and rights to property, whether real or personal, belonging to such person" (I.R.C. § 6321). As soon as the lien arises, the government may initiate a plenary suit in district court to foreclose the lien and subject the delinquent taxpayer's property to payment of the tax (I.R.C. § 7403(a)). All persons claiming an interest in the property must be joined in such an action (I.R.C. § 7403(b)). See generally *United States* v. *Rodgers*, No. 81-1476 (May 31, 1983), slip op. 3-4; 4 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.1 (1981).

Alternatively, the IRS may collect unpaid taxes by administrative levy, a procedure that, unlike the procedure described above, typically "does not require any judicial intervention" (*Rodgers*, slip op. 4). Section 6331(a) provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property * * * belonging to such person or on which there is a [federal tax] lien."[5] Section 6332(a) in turn provides that "any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process." A person who honors an IRS levy is "discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property" surrendered (I.R.C. § 6332(d)). A person who refuses to honor a valid levy is "liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made" (I.R.C. § 6332(c)(1)). Third persons claiming an interest in property levied upon may bring a "wrongful levy" suit against the United States to obtain appropriate relief (I.R.C § 7426).

Administrative levy "is a summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims"

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[5] Section 6334 specifies certain types of property that are exempt from IRS levy. None of those exemptions covers the bank accounts at issue here.

(*United States* v. *Sullivan*, 333 F.2d 100, 116 (3d Cir. 1964)). The "underlying principle" justifying administrative levies is "the need of the government promptly to secure its revenues." *Phillips* v. *Commissioner*, 283 U.S. 589, 596 (1931). The constitutionality of the procedure "has long been settled." *Id.* at 595. Accord, *e.g.*, *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972); *Bull* v. *United States*, 295 U.S. 247, 259-260 (1935).

b. In this case, the IRS decided to pursue the administrative option and to collect Roy's unpaid taxes by levying upon his bank accounts. The courts of appeals have uniformly held, in accordance with the plain language of Sections 6331 and 6332, that a bank (or other person) served with an IRS notice of levy "has only two defenses for a failure to comply with the demand, [namely,] that the person is not in possession of the taxpayer's property or [that] the property is subject to a prior judicial attachment or execution." *United States* v. *Sterling National Bank*, 494 F.2d 919, 921 (2d Cir. 1974) (citing cases). Accord, *e.g.*, *Bank of Nevada* v. *United States*, 251 F.2d 820, 824 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958). Respondent has never suggested that the bank accounts at issue here were not in its possession[6] or were subject to a prior judicial attachment or execution. The only question, therefore, is whether those accounts constituted "property [or] rights to property * * * belonging to" Roy (I.R.C. § 6331(a)).

[6] Technically, of course, a bank account establishes a debtor-creditor relationship between the bank and its depositor. Section 6332(a) takes this technicality into account by providing that anyone "in possession of *(or obligated with respect to)* property or rights to property" shall surrender it in response to an IRS levy (emphasis added). Levies on bank accounts have been permitted since the Revenue Act of 1924, ch. 234, § 1016, 43 Stat. 343. The regulations explicitly state that "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property * * * including * * * bank accounts." Treas. Reg. § 301.6331-1(a)(1).

In deciding whether an entitlement amounts to "property [or] rights to property" within the meaning of Sections 6321 and 6331, "'state law controls in determining the nature of the legal interest which the taxpayer ha[s] in the property.'" *Aquilino* v. *United States*, 363 U.S. 509, 513 (1960) (quoting *Morgan* v. *Commissioner*, 309 U.S. 78, 82 (1940)). Accord, *e.g.*, *Rodgers*, slip op. 4. This principle follows from the fact that the Internal Revenue Code "creates no property rights, but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements" of the Internal Revenue Code, of course, "state law is inoperative" and the tax consequences thenceforth are dictated by federal law (*id.* at 56-57).

In the instant case, the question whether Roy had a "right * * * defined by state law" (*Bess*, 357 U.S. at 55) is measured by his contract with the bank, as enforced by relevant Arkansas statutory provisions. See *id.* at 55; *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1105-1107 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *United States* v. *Bowery Savings Bank*, 297 F.2d 380, 382-383 (2d Cir. 1961). Under Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts, without notice to his co-depositors, for his own exclusive benefit.[7] The bank for its part was obligated to honor

[7] The relevant Arkansas statutes provide that, if a checking or savings account is opened in the name of two or more persons, whether as joint tenants, tenants by the entirety, tenants

any withdrawal requests Roy might make, again up to the full value of the accounts.[8] The Eighth Circuit thus correctly concluded that, under Arkansas law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (App., *infra*, 6a).

Having thus interpreted Arkansas law, the court of appeals erred in holding that Roy did not possess "property [or] rights to property," up to the full value of the accounts, within the meaning of Section 6331(a). This Court has squarely held that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms "ha[s] 'property' or 'rights to property,' within the meaning of [the predecessor of Section 6321]." *United States* v. *Bess*, 357 U.S. at 56.[9] The Eighth Circuit itself has

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in common or otherwise, all monies deposited become the property of such persons as joint tenants, each person having the unrestricted right to withdraw the entire sum. See Ark. Stat. Ann. §§ 67-521, 67-552 (1980), *reprinted in* App., *infra*, 37a-38a.

[8] The relevant Arkansas statutes provide that "a banking institution shall pay withdrawal requests * * * and otherwise deal in any manner with the account * * * upon the direction of any one (1) of the persons named therein * * * unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required." Ark. Stat. Ann. § 67-552(d) (1980), *reprinted in* App., *infra*, 37a–38a). The bank has never suggested that such "written instructions" existed here. The Arkansas statutes further provide that the bank's payment to any one depositor constitutes "a valid and sufficient release and discharge of said bank" from co-depositors' claims, absent written notice from them not to pay. Ark. Stat. Ann. §§ 67-521, 67-522(h) (1980), *reprinted in* App., *infra*, 37a-38a.

[9] The question in *Bess* was whether a delinquent taxpayer's interest in an insurance policy covering his life constituted

held, on another occasion, that "[t]he unqualified contractual right to receive property is itself a property right subject to seizure by levy." *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (1980). It is well established that the IRS in a levy proceeding "steps into the taxpayer's shoes," that is, acquires rights no greater and no less than the taxpayer himself possesses. See, *e.g.*, *Mansfield* v. *Excelsior Refining Co.*, 135 U.S. 326 (1890); *St. Louis Union Trust Co.*, 617 F.2d at 1302; 4 Bittker, *supra*, ¶ 111.5.4, at 111-102 (citing cases). Since Roy had the right to withdraw the outstanding balance and use it to pay his taxes, the IRS, by virtue of the levy, sought to do on his behalf no more than he could have done of his own volition. In such circumstances, where a bank depositor under state law has the unrestricted right to withdraw funds from the account, "it is inconceivable that Congress * * * in-

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"property [or] rights to property" to which a tax lien could attach (357 U.S. at 55). After noting that "the rights of the insured are measured by the policy contract as enforced by [relevant state] law," the Court held that the insured did "ha[ve] 'property' or 'rights to property,' within the meaning of [the predecessor of Section 6321], in the [policy's] cash surrender value," reasoning that the insured had "the right under the policy contract to compel the insurer to pay him this sum" and thus possessed "a chose in action * * * which he could have collected from the insurance companies in accordance with the terms of the policies" (*id.* at 55, 56 (original quotation marks omitted)). Contrariwise, the Court held that the insured did not "ha[ve] 'property' or 'rights to property' in the [insurance] proceeds, within the meaning of [the predecessor of Section 6321]," reasoning that he "could not enjoy the possession of the proceeds in his lifetime" and that the proceeds were "reducible to possession by another only upon [his] death" (*id.* at 55-56). In 1966, Congress amended Section 6332, consistently with this Court's decision in *Bess*, to make clear that the IRS can levy on the cash surrender value of a life insurance policy. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b), 80 Stat. 1135 (presently codified in I.R.C. § 6332(b)).

tended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor." *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972). Accord, *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1107.

In sum, Roy possessed an unrestricted right under state law to compel the bank to pay him the entire balance outstanding in the two accounts. That right constituted "property [or] rights to property * * * belonging to" Roy within the meaning of Section 6331(a). The bank was "obligated with respect to" Roy's right to property (I.R.C. § 6332(a)), since state law required it to honor any withdrawal requests, up to the outstanding balance, that Roy might make. The bank thus had no basis for refusing to honor the levy, and the courts below erred in not holding it personally liable for its refusal.

2. In holding that Roy did not possess "property [or] rights to property" on which the IRS could levy, the court of appeals relied principally on Arkansas garnishment law. It noted (App., *infra*, 7a) that an "ordinary creditor[ ]" of a bank depositor in an Arkansas garnishment proceeding is not "subrogated to that co-owner's power to withdraw the entire account." The court of appeals reasoned that the IRS, in a Section 6331 levy proceeding, similarly does not "stand in [the delinquent taxpayer's] shoes" (App., *infra*, 7a).

The court's reasoning seriously misconceives the role of state law in resolving federal tax questions of the sort involved here. This Court has repeatedly held that state law is relevant only in "determining the *nature of the legal interest* which the taxpayer ha[s] in the property * * * sought to be reached" by the federal taxing statute. *Aquilino*, 363 U.S. at 513 (emphasis added; original quotation marks omitted). Once the nature of the taxpayer's legal interest is defined, the question

whether that interest constitutes "property [or] rights to property," as those terms are used in Section 6331(a), is a question of federal law. *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105; see *Bess*, 357 U.S. at 56. The fact that under state law ordinary creditors may be unable to reach the full value of the taxpayer's legal interest is therefore not determinative of the federal tax outcome. In *Bess*, this Court held it irrelevant that "under state law the [taxpayer's] property right * * * [was] not subject to creditors' liens," ruling that, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the predecessor of Section 6321], state law is inoperative" (357 U.S. at 56-57 (citations omitted)).

Contrary to the court of appeals' conclusion, therefore, the facts that under Arkansas law Roy's creditors (unlike Roy himself) could not draw down the entire balance in the accounts (App., *infra*, 7a) and would have to join Roy's co-depositors in a garnishment proceeding (*ibid.*) do not answer the question whether Roy's legal interest constituted "property [or] rights to property * * * belonging to" him, within the meaning of Section 6331(a). See *Bess*, 357 U.S. at 56. The federal statute, after all, refers to *the taxpayer's* rights to property, not his creditors' rights. Yet the court of appeals has effectively deprived the federal statute of all independent force here, by remitting the Service to only the rights that any creditor of the taxpayer would have under state law.

This is not to say, of course, that the rights and possibly competing claims of Roy's co-depositors are ignored under the Internal Revenue Code. In enacting the Code's summary collection procedures, Congress fully recognized that the IRS would occasionally levy in error, and that, "where the Government levies on property which, in part at least, a third person considers to

be his, he is entitled to have his case heard in court." S. Rep. 1708, 89th Cong., 2d Sess. 29 (1966). Congress accordingly provided, in Section 7426 of the Code, that a person claiming an interest in property seized for another's taxes may bring a "wrongful levy" action against the United States to have the property (or the proceeds of its sale) returned. Congress likewise provided, in Section 6343(b), that an aggrieved claimant may file, before proceeding to court, an administrative request for return of the property at issue. See Treas. Reg. § 301.6343-1(b)(2). This Court has repeatedly sustained the constitutionality of this post-seizure hearing procedure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips*, 283 U.S. at 595) because "the very existence of the government depends upon the prompt collection of the revenues" (*G.M. Leasing Corp.*, 429 U.S. at 352 n.18).

In its solicitude for the potential claims of Roy's co-depositors, the court of appeals has ignored the statutory scheme that Congress established. Congress determined that the interests of the government in the speedy collection of taxes and the interests of other claimants to the delinquent taxpayer's property are best reconciled by permitting the IRS to levy on the taxpayer's assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial hearing. The court of appeals erred in concluding that such ownership disputes must be finally resolved—and that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required.

3. In holding that Roy did not have "property [or] rights to property" in the bank accounts at issue, the decision below conflicts, either directly or in principle, with decisions of this Court and of other courts of appeals.

a. The courts of appeals for the Second, Fifth, and Ninth Circuits have held that a delinquent taxpayer's unrestricted right, defined by state law and by his contract with the bank, to withdraw funds from a bank account constitutes "property" or a "right to property" subject to IRS levy, regardless of the fact that there exist other claims to the funds on deposit and that the question of ultimate ownership is unresolved. In *United States* v. *Sterling National Bank*, 494 F.2d 919 (2d Cir. 1974), a bank contended that its depositor had no "property [or] rights to property" in a checking account because the bank had an unexercised right of set-off (494 F.2d at 921). After consulting relevant state law, the Second Circuit (*id.* at 922) rejected this argument:

> Under any realistic definition of "property" the full amount in [the delinquent taxpayer's] account was his property or his right to property. Until the bank acted to restrict his right to draw on the funds, [the taxpayer] was entitled to write checks up to the full amount in the account. * * * At any time up to when the IRS served its notice of levy, [the taxpayer] could have written a check payable to the IRS for the balance of his account. Here the IRS was asserting no right to the funds in the checking account that [the taxpayer] did not already have.

The Second Circuit accordingly held that "all the funds in [the delinquent taxpayer's] checking account were his property" and hence were subject to levy to satisfy his taxes (*ibid.*).

The same conclusion has been reached, for substantially similar reasons, by the Fifth and Ninth Circuits and by numerous district courts. See *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1107 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977) (delinquent taxpayer had "property [or] rights to property" so long as he "was permitted to withdraw from

his account"); *Bank of Nevada* v. *United States*, 251 F.2d 820, 824-825 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958); *United States* v. *First National Bank*, 348 F.Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972) (so long as "the depositor is free to withdraw from his account, * * * it is inconceivable that Congress * * * intended to prohibit the Government from levying on that which is plainly accessible to [him]"); *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S. D. Cal. 1965) (co-depositor had "property [or] rights to property" up to full value of joint account where each depositor "was entitled to the whole of said account"); *Tyson* v. *United States*, 63-1 U.S. Tax Cas. (CCH) ¶ 9300 (D. Mass. 1962) (same); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953) (same). The Eighth Circuit's holding in this case directly conflicts with these decisions.[10]

b. The decision below is also contrary to numerous cases holding, in a wide variety of contexts, that potential disputes as to ownership do not negate the existence of "property [or] rights to property" subject to levy, and that, "[w]hen someone other than the taxpayer claims an interest in [such] property or rights to property * * *, his exclusive remedy against the United States is a wrongful levy action under I.R.C.

[10] As noted in the text, a number of the cited decisions involved individual rather than joint bank accounts, where the potentially competing claim was that of the bank rather than of a co-depositor. In each case, however, the dispositive question was whether the delinquent taxpayer's legal rights vis-a-vis the bank under state law—*i.e.*, his unrestricted right to draw down the full outstanding balance—constituted "property [or] rights to property" within the meaning of Section 6331. The cited decisions and the decision below are in direct conflict on this question, although the question has arisen in factual contexts that involve immaterial differences in the identities of the competing claimants and the nature of their claims.

§ 7426." *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980). Accord, *e.g.*, *Valley Finance, Inc.* v. *United States*, 629 F.2d 162, 170-171 (D.C. Cir. 1980), cert. denied, 451 U.S. 1018 (1981). As noted above (see page 8, *supra*), the courts of appeals have uniformly held that the Code admits of only two defenses to compliance with an IRS levy—that a person is not in possession of the taxpayer's property, or that the property is under prior judicial attachment. See, *e.g.*, *United States* v. *Sterling National Bank*, 494 F.2d at 921; *Bank of Nevada* v. *United States*, 251 F.2d at 824; *Commonwealth Bank* v. *United States*, 115 F.2d 327, 330-331 (6th Cir. 1940). The fact that other parties may have competing claims to the property is not one of these defenses.[11] In attaching dispositive force to the possibility that Roy's co-depositors "might have had a claim against Roy" if he had exercised his right to withdraw the funds (App., *infra*, 6a), and in rejecting the government's contention

[11] The court of appeals below interpreted this Court's decision in *United States* v. *Rodgers*, *supra*, to "impl[y] that levy is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties" (App., *infra*, 17a). This Court's decision in *Rodgers* contains no such implication. Indeed, in *G.M. Leasing Corp.*, 429 U.S. at 350-351, the Court upheld an IRS levy on property "bearing on its face the name of a third party"—a straw man who was found to be the taxpayer's alter ego. The lower courts have repeatedly sustained levies in such circumstances. *E.g.*, *Valley Finance, Inc.*, 629 F.2d at 165 (alter ego of taxpayer); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499 (E.D. Pa. 1977) (nominee of taxpayer); *James E. Edwards Family Trust* v. *United States*, 572 F. Supp. 22 (E.D. N. M. 1983) (trust found to be a nullity). As noted in the text, the courts with regularity have sustained levies against property "in which third parties have an interest." And as noted below (see page 19, *infra*), the IRS serves notices of levy on several hundred thousand joint bank accounts (not to mention other forms of jointly-held property) every year.

that his co-depositors' "only recourse [in that event] would be a Section 7426 action for wrongful levy against the government" (App., *infra*, 15a), the decision below conflicts, in fundamental principle, with these cases.[12]

c. Finally, the decision below does not comport with governing principles, established in decisions of this Court and of other circuits, respecting the role properly played by state law in determining the validity of IRS levies and liens. As noted above (see pages 12-13, *supra*), state law is relevant only "in determining the nature of the legal interest which the taxpayer ha[s] in the property" (*Aquilino*, 363 U.S. at 513). Whether the taxpayer's interest, as thus defined, amounts to "property [or] rights to property" within the meaning of Section 6331 is a question of federal law (*Bess*, 357 U.S. at 56-57; *United States* v. *Citizens & Southern Bank*, 538 F.2d at 1105). State-law restrictions on ordinary creditors' rights are irrelevant in answering this question (*Bess*, 357 U.S. at 56-57). In holding the provisions of Arkansas garnishment law to be dispositive of the question whether Roy had "property [or] rights to property" for federal tax purposes, the Eighth Circuit ignored these well-settled principles.

[12] In rejecting this line of authority, the court of appeals relied primarily on *United States* v. *Stock Yards Bank*, 231 F.2d 628 (6th Cir. 1956). The Sixth Circuit there ruled that the IRS could not levy on United States savings bonds held in the names of a husband and wife to satisfy the former's tax liability, reasoning that "[p]roof of the actual value of the taxpayer's interest was an essential element of the government's case" (231 F.2d at 631). In our view, *Stock Yards Bank* can be distinguished on its facts. The Sixth Circuit emphasized that the form of co-ownership in which the U.S. savings bonds were held was neither a joint tenancy nor a tenancy by the entirety, but "rather [was] an estate the limitations and conditions of which are delineated by the terms of the contract and by federal law" (*id.* at 630). The applicable federal regulations provided that "if a debtor * * * is not the sole owner of the bond, payment will be made only *to the extent of his interest therein*, which must be determined by the court or otherwise validly established" (31 C.F.R. 315.13 (1955), quoted in 231 F.2d at 631 (emphasis added by the court of appeals)). In *Stock Yards Bank*, therefore, other, more particularized provisions of federal law placed a gloss on the term "property [or] rights to property" as generally used in Section 6331(a); the provisions of Arkansas garnishment law, obviously, can impose no such gloss on that term here. Although we think that the Sixth Circuit thus reached the right result on the facts presented in *Stock Yards Bank*, we disagree with much of that court's reasoning and believe that the case should be confined to the narrow situation there involved—*viz.*, an IRS levy on co-owned United States savings bonds.

4. The question presented is of utmost administrative importance. The decision below, if allowed to stand and if followed by other courts, would impose burdens of staggering dimension on the IRS, the banking system, the federal courts, and taxpayers themselves. Even absent a circuit conflict, therefore, the case would merit this Court's review.

a. Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. During the past three and a half years, the IRS has served nearly four million notices of levy, principally on employers and banks.[13] The chief advantage of administrative levies is their nonjudicial nature, a characteristic that renders the collection process both expeditious and inexpensive. Although a levy does not determine ultimate ownership rights where such rights are in dispute, it does protect the government "against diversion, loss, or concealment of the property" while the dispute is being resolved (4 Bittker, *supra*, ¶ 111.5.4, at 111-108).

[13] The IRS has provided us with the following breakdown of levies served during fiscal 1981-1983 and during the first half of fiscal 1984:

	Total Levies	*Levies on Banks*
FY 1981	740,103	308,622
FY 1982	1,058,452	441,374
FY 1983	1,390,900	580,005
FY 1984 (1st half)	741,900	300,000

It is common knowledge that American taxpayers frequently hold financial assets, particularly bank accounts, in joint name. Indeed, during the past three and a half years, the IRS served notices of levy on some 800,000 joint bank accounts.[14] The IRS estimates that, in about half these cases, the account was held in the names of a delinquent taxpayer and a "third party" (*i.e.*, a party who did not share liability for the tax delinquency), the levy being predicated on the delinquent taxpayer's right unilaterally to withdraw the entire balance. Very few of these cases resulted in litigation, be it an enforcement action by the Commissioner or a wrongful levy action by the co-depositor. Rather, the bank simply paid the funds to the IRS, the taxpayer acquiesced, the co-depositor raised no objection, and no one ever went to court.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the ultimate "ownership interests" of the delinquent taxpayer and his various co-depositors. Practically speaking, this will make administrative levies impossible whenever a delinquent taxpayer's property is titled in joint name. The burden of sorting out the potential claims inter sese of joint tenants is "an impossible burden to cast upon a party not privy to the confidential relationship normally existing between such co-owners." Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 629 (1968). As the Eighth Circuit observed below, the "rights of the co-owners *inter sese* * * * depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among [them]" (App., *infra*, 6a-7a). Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, 77 Yale L.J. at 629), typically entailing "[a] long series of deposits which cannot be traced to their source, and a similar series of withdrawals which cannot be traced to their destination." *Park Enterprises, Inc.* v. *Trach*, 233 Minn. 467, 471-472, 47 N.W. 2d 194, 197 (1951). The decision below invites self-serving affidavits by delinquent taxpayers and their co-depositors, all of whom will typically be related, if not by blood, by friendship or commercial ties. Quite obviously, proving the respective "ownership interests" of such co-depositors is not a burden that the IRS, at the administrative levy stage, would find easy to bear.

[14] Statistics referred to in this petition are derived from IRS records and were provided to us by the Service.

Faced with the difficulty of resolving ownership disputes administratively, the IRS, if it wished to pursue a delinquent taxpayer's interest in a joint account, would have no alternative but to follow the Eighth Circuit's suggestion (App., *infra*, 17a) and bring a lien foreclosure suit under Section 7403(b), joining all co-depositors as defendants. But this would place an enormous burden on the Commissioner and on the courts. As noted above, the IRS in the past three and a half years has served notices of levy on some 400,000 joint bank accounts titled in the names of a delinquent taxpayer and a "third party." The Service estimates that slightly more than half these cases—200,000 or more—would have involved sufficient tax liabilities to justify the time and expense of litigation. This number of additional cases would cost the government tens of millions of dollars to litigate and would impose a tremendous strain on the federal district courts. The fiscal impact would be aggravated by the delay in collecting hundreds of millions of dollars in revenues while the litigation was pending, as well as by the risk that the bank accounts would be depleted in the interim. And since about half the cases—some 80,000 per year, projecting from the figures above—would in all proba-

bility be dropped as not warranting the expense of litigation, collection of the associated revenues in those cases could be foregone entirely.

Given the prohibitive cost of litigating over levies on joint bank accounts, the Commissioner would be forced by the decision below to consider other collection measures, such as seizures of delinquent taxpayers' houses, cars, and other tangible property. At present, the IRS generally tries to collect unpaid taxes by levy on intangible assets rather than by seizure of tangible property—a preference explained by the fact that seizure is a slow and drawn-out process, often burdensome to the taxpayer, invariably costly for the IRS, and usually unpleasant for all concerned.[15] If the decision below is allowed to stand, the Commissioner would have no alternative but to take more collection action against tangible property—a step about which neither the Commissioner nor taxpayers are likely to be enthusiastic.

Finally, the decision below would provide tax protestors and other tax evaders with a new and effective means to delay or defeat collection of the tax. Some 37,000 illegal protest returns were filed in fiscal 1983, a six-fold increase over the comparable figure for 1978. Tax protestors can take advantage of the Eighth Circuit's decision simply by adding extra names—accommodating relatives, or other tax protestors—to their bank accounts. This might be all that would be necessary to immunize relatively small accounts from enforced collection, since the Service would not likely find it profitable to litigate such cases. Alternatively, a taxpayer with a delinquent tax liability might attempt to

[15] During fiscal 1983, for example, the IRS served 1,390,900 levies and executed only 15,554 seizures—a ratio of about 100 to one. Seizures are far more expensive because they entail, *e.g.*, courthouse searches for prior liens, expenses of appraising and advertising the property, and costs of execution.

"launder" deposits to a joint account through a "third party" co-depositor, hoping that the Commissioner would be unable to prove whose money is whose; although such schemes can be exposed, the attendant costs are large. And, significantly, tax protestors might well rely on the decision below to bring suit against banks that continue to honor—correctly, in our view—IRS levies on joint accounts of the sort involved here. Although banks would probably have good defenses to such suits,[16] the expense of litigating even frivolous cases could be substantial.

In *Bull* v. *United States*, 295 U.S. 247, 259 (1935), this Court declared that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." The administrative levy system is a time-honored, congressionally-authorized collection technique designed to ensure that this need is equitably met. The decision below poses a serious threat to the efficacy of that system.

[16] As we have noted (page 7, *supra*), Section 6332(d) discharges a bank "from any obligation or liability to the delinquent taxpayer" with respect to property surrendered pursuant to an IRS levy. Although that Section does not immunize the bank against suits by the delinquent taxpayer's co-depositors, state law typically provides (as Arkansas law does here) that the bank's payment to one depositor relieves it of liability to others. See page 10 note 8, *supra*. And since the government stands in the shoes of the delinquent taxpayer when levying on a bank account, the bank's payment to the IRS should likewise insulate it from co-depositors' suits. See, *e.g.*, *United States* v. *Bowery Savings Bank*, 297 F.2d 380 (2d Cir. 1961); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499 (E.D. Pa. 1977). Although there is thus little basis in fact for the court of appeals' concern (App., *infra*, 14a-15a) that the bank would "expose [itself] to double liability" by honoring the levy at issue here, the costs that such litigation would impose on banks—litigation that, ironically, would be encouraged by the decision below—cannot lightly be dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-1218

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

On Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: September 15, 1983
Filed: January 31, 1984

Before BRIGHT, ARNOLD, and FAGG, *Circuit Judges*.

ARNOLD, *Circuit Judge*.

The United States claims that one Roy J. Reeves has not paid all of his income tax for the year 1977. There are two bank accounts in the National Bank of Commerce of Pine Bluff, Arkansas, in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The government served a notice of levy on the bank, demanding that enough of the accounts to satisfy the taxpayer's obligation be paid over to it. The bank, protesting that it did not know how much of the account belonged to Roy, as opposed to Ruby or Neva, refused. The government then brought this action under Section 6332(c)(1) of the Internal Revenue Code of 1954, 26 U.S.C. § 6332(c)(1) (1976), seeking judgment against

the bank "in [its] ... own person and estate" for the amount of taxes it claimed Roy owed. The District Court[1] held for the bank on summary judgment. *United States* v. *National Bank of Commerce*, 554 F. Supp. 110 (E.D. Ark. 1982). It held that the Due Process Clause of the Fifth Amendment requires the government, when serving a Section 6331 notice of levy on a bank account bearing names of persons other than the delinquent taxpayer, to notify the other ostensible owners of the account, and give them a chance to show how much of the account they own. Otherwise, the levy statutes would deprive the other owners of their property without due process of law.

We do not reach the constitutional questions decided by the District Court. In fact, we have a duty not to reach them if the statutes themselves, interpreted aright, in fact give adequate protection to the nontaxpayers' property rights. The only appellate case in point, *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956), holds that the government cannot succeed without providing the actual value of the delinquent taxpayer's interest in jointly owned property. We follow *Stock Yards Bank*, which reached its result as a matter of statutory construction, not due process, and affirm the District Court's judgment on that ground.

I.

The facts are stipulated. When the complaint was filed, Roy J. Reeves owed $856.61 in income tax for the year 1977.[2] On June 10, 1980, there were in the National Bank of Commerce a checking account and a sav-

[1] The Hon. Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

[2] More precisely, the government claimed this amount, and the bank did not dispute the claim. Reeves is not a party to this case. We do not know if he admits tax liability, or what defenses he might have to it.

ings account in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The balance in the checking account was $321.66, and the balance in the savings account was $1,241.60. Any one of the three parties, Roy, Ruby, or Neva R., was authorized to withdraw money from the accounts. We do not know who owned the money before it was deposited, nor do we know in what proportion the accounts are owned. The government and the bank, in fact, have agreed that "[n]o further evidence as to the ownership of the monies in the subject bank accounts will be submitted." Supplement to Stipulation of Facts, Designated Record (D.R.) 13. The government's notice of levy, as amended on June 26, 1980, demanded that the bank pay over to it the $856.61 owed by Roy. The bank refused. The government brought this action on September 28, 1981, and the District Court granted the bank's motion for summary judgment on December 16, 1982.

II.

Under Section 6331(a) of the 1954 Code,

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary [of the Treasury] to collect such tax ... by levy upon all property and rights to property ... belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

Property on which such a lien exists is described in Section 6321:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person.

"[A]ny person in possession of ... property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights ... to the Secretary." Section

6332(a). And if he "fails or refuses" to do so, he "shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made...." Section 6332(c)(1).

The government's position is simple. The bank had possession of rights to property belonging to the taxpayer. (Or, more accurately, the bank owed the taxpayer money. Only a banker has money in a bank. The depositors are creditors of the bank.) The bank failed to surrender these rights in response to a levy. It is therefore personally liable to the United States for the amount in the accounts, but not in excess of the amount owed in taxes. If someone else, Ruby or Neva, also had an interest in the account, their remedy is to sue the government for wrongful levy under Section 7426(a)(1), which gives an action to "any person," other than the taxpayer, "who claims an interest in ... property and that such property was wrongly levied upon...."

We think analysis will be aided by approaching the issue in two stages. First, what property or property rights of Roy Reeves did the bank have in its possession? Second, what obligation does the statute impose on the bank with respect to that property? The first question depends on state law, see *Aquilino* v. *United States*, 363 U.S. 509, 512-14 (1960), the second on federal law.

A.

Two Arkansas Statutes are relevant. Ark. Stat. Ann. § 67-521 (1980)[3] provides that when a deposit is made

[3] This statute was repealed by 1983 Ark. Acts No. 843, § 2. The repeal is effective March 25, 1983, so the parties' rights in this case are governed by the old statute. The substance of this statute is now codified at Ark. Stat. Ann. § 67-522(a) (1983).

> in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit ... shall become the property of such persons as joint tenants, and the same ... may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

And Ark. Stat. Ann. § 67-552 (1980), *amended by* 1983 Ark. Acts No. 843, § 1, provides, in pertinent part, as follows:

> 67-552. *Accounts and certificates of deposit in two or more names.*—Checking accounts and saving accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:
>
> * * * * *
>
> (d) If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit].

* * * * *

(h) The person to whom such account or certificate of deposit is issued may pledge, withdraw or receive payment and any such payment made by the banking institution shall be a complete discharge as to the amount paid.

The deposit agreement or signature card is not in the record. We do not even know whether the three Reeveses whose names are on the account are related by blood or marriage. All we know is that the account is in the names of Roy or Ruby or Neva. One might think that Section 67-521, quoted above, means that Roy, Ruby, and Neva are joint tenants, and that each of them therefore owns one-third of the account, with right of survivorship upon the death of either or both of the others. But the statute has not been so construed. *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), holds that the statute was

> passed for the protection of the bank in which the deposit was made.... The statute effects no investiture of title as between the depositors themselves, but only relieves the bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved.

199 Ark. at 617, 135 S.W.2d at 841. *Accord*, *McGuire* v. *Benton State Bank*, 232 Ark. 1008, 1012, 342 S.W.2d 77, 79 (1961).

Thus, Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank. But they might have had a claim against Roy for conversion. The rights of the co-owners *inter sese* are not determined by the cited Arkansas statutes. Those rights depend on the intention of whoever deposited the

money, or on whatever agreement, if any, might have been made among the co-owners, or on some other applicable rule of state law. If, for example, a spouse makes a deposit in a bank account that bears both spouses' names, a tenancy by the entirety is created, defeasible by either spouse at will simply by making a withdrawal. *E.g.*, *Black* v. *Black*, *supra*. But here we do not know whether Roy is married to Ruby or Neva. In fact, both the government and the bank have studiously avoided finding out. Nor do we know whether any of the co-owners has given the notice to the bank that the statute mentions. In short, we know, or presume, that each co-owner could withdraw all of both accounts, but that is all we know.

It might be argued that the very right, conferred by statute, to make withdrawals is a "right to property" belonging to Roy, on which the government could levy. The government, on this view, would stand in Roy's shoes and could do anything Roy could do, subject to whatever duties Roy owes to Ruby or Neva. But that, as [*sic*] least as to ordinary creditors, is not the law of Arkansas. In *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W. 2d 752 (1964), the Supreme Court specifically rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account. Instead, a creditor must join both co-owners as defendants, and the co-owner who is not the debtor may show by parol or otherwise the extent of his or her interest in the account. Only that portion of the account not so shown to belong to the non-debtor co-owner may be reached by the other co-owner's creditor on a garnishment.

B.

We now turn to the cases interpreting the levy statutes, Sections 6331 and 6332, and their predecessors. Distress and sale of goods of taxpayers who refuse to pay have been authorized ever since the First Con-

gress. Act of March 3, 1791, c. 15, § 23, 1 Stat. 204. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977). The case most nearly in point for present purposes is *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956). There, the Internal Revenue Service served a levy on the bank, which had in its possession 150 $25.00 U.S. Savings Bonds, each registered in the names of "Clarence J. Theobald or Mrs. Theas Theobald." Clarence J. Theobald owed income taxes. Mrs. Theas Theobald, who was his wife, did not. The bank refused to honor the levy, and the United States brought suit to hold it personally liable.[4] The Court of Appeals, speaking through Judge (later Mr. Justice) Stewart, held for the bank.

The Court first described the incidents of co-ownership of Series E bonds:

> [A] co-owner may alone present the bond for redemption, receive payment in full, and thereby eliminate the other co-owner's interest in the bond, so far at least as the issuer is concerned. 31 Code Fed. Reg. § 315.45.
>
> As between two co-owners, however, the regulations as well as judicial decisions have recognized that the extent of the property interest of each is a question of fact, not of law. One co-owner may as a matter of fact be the sole owner of the bond; he may be a half owner; he may have some other fractional ownership.

231 F.2d at 631. In the case before it, the Court said,

> the government adduced no evidence to establish the extent, if any, of [the taxpayer's] ... property interest in [the bonds].... Proof of the actual

[4] Suit was brought under Section 3710 of the Internal Revenue Code of 1939, 26 U.S.C. § 3710 (1952). This predecessor statute does not differ in any relevant way from §§ 6331 and 6332 of the present Code.

> value of the taxpayer's interest was an essential element value of the government's case under the statute, and for lack of such proof the case falls.

Ibid. In support of this result, the Court cited a number of "decisions relating to *joint bank accounts* and insurance policies," *ibid.* (emphasis ours) and described them as "closely analogous."

The Sixth Circuit further explained:

> It should be pointed out ... that distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But is [*sic*] is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.
>
> There is available to the government an alternative remedy well-designed to resolve the issues in the present case. Under Section 3678 of the Internal Revenue Code of 1939[5], the United States can bring suit against the bank to enforce a lien on the bonds and name both the taxpayer and his wife co-defendants. In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all parties fully protected.

Id. at 631-32 (citation and footnote omitted).

It is at once apparent that these words might have been written with just the present case in mind. We see no relevant different between *Stock Yards Bank* and the case now before us. The government, Brief for Ap-

[5] The present version of this statute is Section 7403 of the 1954 Code, which is equally available to the government here. See 231 F.2d at 632 n.2.

pellant p. 18, offers only the following suggested distinction:

> *Stock Yards Bank* involved savings bonds registered in the name of taxpayer and his wife as co-owners. The court required the Government to bring a lien enforcement acton for a judicial determination of ownership interests. Federal law provides in the case of savings bonds that ownership rights are to be determined by an agreement of the co-owners or by valid judicial process. See Treasury Regulations Governing U.S. Savings Bonds, Series A, B, C, D, E, F, G, H, J, and K, and U.S. Savings Notes, 31 C.F.R. Sec. 315.21(a). Thus, the holding in *Stock Yards Bank* took place in a significantly different legal environment than the one here involved.

We reject this argument. Certainly the "legal environment" of *Stock Yards Bank* is "different": there, the rights of co-owners depended on federal law; here, they depend on state law. But the difference is without legal significance. It pertains only to the law governing the nature of the taxpayer's property rights. It has nothing to do with the operation of the levy statutes on those rights, once their nature and extent are ascertained. Here, as in *Stock Yards Bank*, there are co-owners who may demand full payment, and whose rights may be affected if the levy is honored. It matters not which sovereign in our federal system conferred the rights at stake.[6]

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[6] It might also have been argued that *Stock Yards Bank* was decided before Section 7426 of the present Code, added by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1143, became law. This is the provision that gives non-taxpayers an express remedy against the United States when its collection effort wrongfully interferes with their property. The answer is that before 1966 third parties "had available an equivalent judicially-created remedy in which [they] ... could have contested the propriety of [a] ... notice of levy." *United States* v. *Weintraub*, 613 F.2d 612, 623 (6th Cir. 1979). The statements that no such remedy existed before 1966, appearing in *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980), and *Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977), seem to be mistaken. See the full discussion in *Gordon* v. *United States*, 649 F.2d 837 (Ct. Cl. 1981).

We conclude, then, that a holding for the government here would place this Court in square conflict with the Sixth Circuit.[7]

C.

The government also contends that a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy. There are unquestionably such cases. We choose to follow *Stock Yards Bank* instead.

1. Only three of the cases that tend to support the government's position are from courts of appeals. Two of these are actions by third parties against the United States for wrongful levy under § 7426. In both of these two, the action was held barred by the nine-month limitations period fixed by Section 6532 of the Code for

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[7] Other cases, some of which are cited in *Stock Yards Bank*, support its reasoning to one degree or another. Because each of them is at least arguably distinguishable, we do not set out their holdings at length. See *United States* v. *Bowery Sav. Bank*, 297 F.2d 380, 385 (2d Cir. 1961) (Friendly, J.) (*held*, for the government; *sed aliter* if an assignee of the savings account levied on had, before the levy, notified the bank of his claim); *Raffaele* v. *Granger*, 196 F.2d 620, 623 (3d Cir. 1952) (warrant of distraint against bank quashed; "The United States has no power to take property from one person, the innocent spouse, to satisfy the obligation of another, the delinquent spouse."); *United States* v. *New England Merchants Nat'l Bank*, 465 F. Supp. 83 (D. Mass. 1979); *United States* v. *Emigrant Indus. Sav. Bank*, 122 F. Supp. 547 (S.D.N.Y. 1954); *United States* v. *Aetna Life Ins. Co.*, 46 F. Supp. 30 (D. Conn. 1942).

such actions. In *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733 (5th Cir. 1980), the Revenue Service served a notice of levy on the Army Corps of Engineers, which owed money jointly to the taxpayer, a prime contractor, and to the plaintiff, a subcontractor. The Corps honored the levy. The plaintiff waited more than nine months to bring its Section 7426 action against the government, and therefore it lost its case. In the course of its opinion, the Fifth Circuit does say that the "Corps was required by I.R.C. § 6332 to turn over funds due" to the taxpayer, 624 F.2d at 739. If this statement is read as meaning that the duty to turn over the funds included even that portion of the money to which the plaintiff subcontractor, as opposed to the taxpayer prime contractor, was entitled, then the opinion does, to that extent, support the government's position here, though probably only in dictum. Another portion of the opinion, on the other hand, remarks that the Corps in fact had honored the levy, and that it was therefore unnecessary to speculate what rights the IRS would have had (a Section 6332 action against another federal agency?) if the levy had been refused. *Id.* at 737 n.5. The implication is that a different sort of question is presented by an action to impose personal liability on a person refusing to honor a levy. That is of course exactly the posture in which the present case presents itself.

Dieckmann v. *United States*, 550 F.2d 622 (10th Cir. 1977), is the same sort of case. A Section 7426 action was held barred by limitations. The third-party, nontaxpayer plaintiff argued that the statute should not begin to run until he received notice of the levy on the property in which he claimed an interest. The Court held that the United States had no duty to give such notice, even when it knew that a third party had a purchase-money security interest in the property of the taxpayer on which it planned to levy. Again, the case cuts in the government's favor, but it is not direct authority for the proposition—which the government

must sustain here—that the holder of the property could not have asserted, as a defense to a Section 6332 action to enforce the levy, that someone other than the taxpayer had an interest in the property.

The third case in this group of appellate decisions is *United States* v. *Citizens & Southern Nat'l Bank*, 538 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). It does say that a bank may not defend against a Section 6332 action to enforce a levy by showing that it had a lien on the taxpayer's account prior to that of the United States. 538 F.2d at 1106. The opinion also says, however, that the result would be otherwise if the bank had taken some positive action, before the levy, to assert a set-off against the account in order to collect money owed to it by the taxpayer-depositor. The import of the case is therefore less than clear. It also seems to us a strange rule of law that a bank with a prior lien on an account must turn over the account in response to a levy, and then litigate its lien in a subsequent Section 7426 action, instead of being allowed to assert the lien as at least a partial defense to the government's Section 6332 action. Such a rule breeds litigation and multiplies expense for no good purpose. *Quaere*, whether the bank would have been allowed, in the government's action to enforce the levy, to plead a Section 7426 counterclaim.

None of these cases even cites *Stock Yards Bank*, and none of them directly and necessarily conflicts with it. We can disagree with the implications of these three cases without creating a direct conflict with another circuit. We cannot hold for the government without doing so, because such a holding would be at war with *Stock Yards Bank*. We feel some compunction about making more work for the Supreme Court by disagreeing with the only clear appellate precedent in point. Holmes said that he would dissent only when he had "got the blood of controversy in [his] ... neck."[8] The same may be

[8] 1 Holmes-Laski Letters 266 (Howe ed. 1953).

said, as a rule, about disagreeing with another court of appeals and creating for the first time a clear conflict in the circuits.

2. The government also relies on a number of district-court cases, and some of them are clearly in point and supportive of its position. *United States* v. *Equitable Trust Co.*, 49 AFTR2d 82-723 (D. Md. 1982); *Sebel* v. *Lytton Sav. & Loan Ass'n*, 15 AFTR2d 488 (S.D. Cal. 1965); *Determan* v. *Jenkins*, 111 F. Supp. 604 (N.D. Ga. 1953); *United States* v. *Third Nat'l Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953).[9] See also *Douglas* v. *United States*, 562 F. Supp. 593 (S.D. Ga.), *aff'd mem*, No. 83-8197 (11th Cir. Dec. 23, 1983); *DiEdwardo* v. *First Nat'l Bank of Bath*, 41 AFTR2d 78-1370 (E.D. Pa. 1978); *Tyson* v. *United States*, 63-1 USTC 87,736 (D. Mass. 1962).[10] We can of course disagree with any of these cases withut creating a conflict in the circuits. But the real question is, not whether an opinion was written by a district court or by a court of appeals, but which opinion is the better reasoned. Most of the district-court opinions cited are more like statements of results than essays written to give a result logical support.[11]

3. So where does the better reasoning lie? We think it lies with *Stock Yards Bank*. For one thing, the con-

[9] The first two cases in this group, both decided after *Stock Yards Bank*, do not even cite it. *Stock Yards Bank* at least acknowledges *Third Nat'l Bank* with a *But see*. 231 F.2d at 631.

[10] The govrnment also cites *United States* v. *Capital Sav. Ass'n.*, 83-2 USTC 88,111 (N.D. Ind. 1983), but there the bank was allowed to show, in a § 6332 action, that a non-taxpayer owned half the account, and judgment was entered against the bank only for the other half.

[11] This is a statement of fact, not a criticism. The district courts are often hard put to it just to decide what the result should be in the ever-growing numbers of cases that confront them, let alone write a full opinion, and the same thing can, unhappily, be increasingly said of the courts of appeals as well.

trary rule might expose the bank to double liability. If it pays over to the Revenue Service the money demanded to pay Roy's taxes, it may have to pay again after being sued by Ruby or Neva. The government replies, first, that this is irrelevant, that Section 6332 does not say that potential double liability is a defense, and therefore it is not. If the bank has to pay twice, too bad. There are cases that so hold. *E.g.*, *United States* v. *Third Nat'l Bank & Trust Co.*, *supra*, 111 F. Supp. at 156. We do not accept such a wooden reading of the statute. Such a callous indifference to natural justice should not be attributed to Congress in the absence of clear statement.

The government argues in the alternative that the levy statutes themselves give anyone honoring a levy a complete defense, against taxpayers and non-taxpayers alike. On this view, the non-taxpayer's only recourse would be a Section 7426 action for wrongful levy against the government. Again, there is authority to support this view. *E.g.*, *Sebel* v. *Lytton Sav. & Loan Ass'n*, *supra*, 15 AFTR2d at 489. But no reasoning is given—only an *ipse dixit*—and the words of the levy statute just will not yield this meaning.

Section 6332(d) provides as follows:

> (d) Effect of honoring levy.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obli-

gation or liability to any beneficiary arising from such surrender or payment.[12]

Plainly, one who honors a levy is discharged from liability only "to the delinquent taxpayer," except in the special case of life insurance. There is not even an implication that Congress intended to supplant a non-taxpayer's common-law remedy for conversion.

4. Dicta in a recent opinion of the Supreme Court also support our decision to follow *Stock Yards Bank*. The case is *United States* v. *Rogers*, 103 S. Ct. 2132 (1983), and it involved the government's right to use Section 7403, the lien-foreclosure statute, to collect taxes from property in which both the taxpayer and another had an interest. In the course of its opinion, the Court also discussed that other collection tool, the Section 6331 levy and distraint, and it had this to say:

> Section 6331, unlike § 7403, does not require notice and hearing for third parties, because *no rights of third parties are intended to be implicated by § 6331*. Indeed, third parties whose property or interests in property have been seized *inadvertently* are entitled to claim that the property has been "wrongfully levied upon," and may apply for its return either through administrative channels, 26 U.S.C. § 6343(b), or through a civil action filed in a federal district court, § 7426(a)(1); see §§ 7426(b)(1), 7426(b)(2)(A).

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[12] The reference to subsection (b) is to a special rule passed for levies on life-insurance and endowment contracts. It provides that the issuer of such a contract, upon being served with a levy, must pay over whatever amount of money the taxpayer could have had advanced to him. The provision was added to change the rule of cases such as *United States* v. *Aetna Life Ins. Co.*, *supra*, 46 F. Supp. at 34-35, that a life-insurance company is not obliged to pay over the cash-surrender value of a policy owned by the taxpayer, because to do so would destroy or affect the rights of others, for example, the beneficiary. There is no such special provision with respect to joint bank accounts or other kinds of property in which non-taxpayers have an interest.

103 S. Ct. at 2144. (Emphasis ours; footnote omitted.)

This passage implies that levy is not normally intended for use as against property in which third parties have an interest, and that the Section 7426 remedy is designed to protect those third parties whose property has been seized "inadvertently." The Supreme Court evidently did not contemplate the use of Section 6331 as against property bearing on its face the names of third parties, and in which those third parties likely have a property interest. The joint bank account involved here is just that type of property, and the government's attempt to seize it, no matter how much of it Roy owns, is not at all inadvertent. *Accord*, *Mansfield* v. *Excelsior Ref. Co.*, 135 U.S. 326, 341 (1890) (cited with approval in *Rogers*, 103 S. Ct. at 2144 nn.20 & 21) (R.S. § 3187, a statutory ancestor of § 6331, held not to give a Collector of Internal Revenue "authority, in that summary mode [distraint], to sell and convey the interest of one who was not a delinquent.").

III.

For the reasons given, and without expressing any view on the constitutional conclusions reached by the District Court, we hold that the summary judgment entered for the bank was proper. The government is free to pursue the taxpayer's interest in the bank account in question by bringing suit to foreclose its lien under Section 7403, joining as defendants the three co-owners of the account. It may also ask the District Court, when such suit is filed, to issue an appropriate order restraining the bank from allowing any withdrawals from the account, until the rights of the various parties have been determined.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

[Filed Dec. 16, 1982]

MEMORANDUM AND ORDER

Pending before the Court are the plaintiff's and defendant's cross-motions for summary judgment and the defendant's motion to dismiss. The facts of the case are these. The Secretary of the Treasury has due and owing from Roy Reeves an unpaid balance of $856.61 in income tax liabilities. On June 13, 1980, in order to collect the sum due, the government filed a notice of levy upon the accounts of Roy Reeves with the defendant, National Bank of Commerce (Bank). At that time the Bank had two separate accounts, one checking and the other savings, both in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The combined balances in both accounts totaled $1,563.26. The government wants the Bank to surrender $856.61 of that amount, but the Bank refuses to do so.

The arguments made by both sides are straightforward. The government concedes that it can levy only upon that portion of the joint funds that belongs to Roy Reeves. Nevertheless, it contends that applicable law

imposes a presumption that all funds in such a joint bank account are prima facie the property of the taxpayer and, ergo, subject to levy, and, therefore, absent appearance and proof by each co-depositor of his or her actual ownership interest in the joint funds, the bank must turn over the funds in such accounts to the tax collector. Because there is no evidence in this record that any of the co-depositors other than Roy Reeves have some individual and separate ownership interest in the funds in the accounts, the government concludes that it is entitled to judgment as a matter of law. It further contends that the statutory defenses are inapplicable here and, furthermore, that the Bank cannot raise the ownership-interest defense of the third-party co-depositors because they are not parties to the present suit.

The Bank argues that before it can release any of the joint funds, the government must prove that Roy Reeves is the actual owner of the portion of the funds levied upon. In order to do this, the Bank contends, the government must join the co-depositors in this suit because they are indispensable parties for the resolution of the ownership issue. Since the co-depositors were not so joined, the Bank would have the Court dismiss the case.

The Internal Revenue Code, 26 U.S.C. §§ 6331 and 6332, permits the imposition of a levy in favor of the United States upon all "property and rights to property . . . belonging to [the delinquent taxpayer]." Furthermore, section 6332 imposes an obligation on any person in possession of property subject to levy to surrender that property upon notice and demand, subject to certain defenses not relevant here.

It is equally clear, however, that property cannot be levied upon and required to be surrendered unless it is actually owned by the taxpayer. *Raffaele* v. *Granger*, 196 F.2d 620 (3d Cir. 1952) (refusing to allow levy upon

bank accounts of taxpayer-husband where accounts were held by husband and wife as tenants by the entirety); *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956) (holding distraint unavailable where property interests are unclear in the property levied upon). *Stuart* v. *Willis*, 244 F.2d 945 (9th Cir. 1957) (levy against property of joint venturers in order to satisfy tax liability of one venturer was void).

While the action for enforcement of the levy is properly within the jurisdiction of this Court, it must look to the law of the State of Arkansas to determine the ownership rights in a joint bank account. *Poe* v. *Seaborn*, 282 U.S. 101 (1930) (ownership of property for tax purposes is determined by state law). *See also United States* v. *Mitchell*, 403 U.S. 190 (1971) (upholding the rule as applied to the Internal Revenue Code of 1954).

The case on point is *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964), in which the Arkansas Supreme Court clarified the rules with respect to the ownership interests in a joint bank account subject to a garnishment proceeding. The rule laid down in that case is as follows:

> [T]he joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which parol evidence is admissible to show the respective contributions of each depositor, as well as any intent of one to make a gift to the other.

Hayden, 238 Ark. at 353, 381 S.W.2d at 753 (quoting from Note, *Garnishment*, 71 Harv. L. Rev. 557, 558 (1958)).

The Arkansas Supreme Court then set out the order and allocation of proof for a case where a joint bank account is garnished. First, the joint account is prima facie subject to garnishment, and the burden is on each joint depositor to show what portion of the funds in the

account he or she owns. Second, if not already joined, each joint depositor should be made party to the suit to afford him or her an opportunity to present evidence of ownership in the account. Third, the garnishment will then be allowed to the extent of the portion of the joint account that is owned by the debtor. *Id.* at 354, 383 S.W.2d at 754.

Other courts are in agreement that the government can levy against a joint bank account only to the extent of the delinquent taxpayer's ownership interest in the account. *See, e.g., Raffaele* v. *Granger, supra.*

The parties in this case agree that only the portion of the joint account owned by the delinquent taxpayer can be levied upon. And, both parties agree that the co-depositors of the joint account are entitled to make known their respective ownership interests in the joint account in order to insure that only that portion of the account belonging to the taxpayer is seized by way of levy. At this point, however, the parties part company and disagree as to the procedure by which the co-depositors should be notified and allowed to represent, and make proof of, their interests in such accounts.

What the Court is left with then is the fundamental issue in this case: by what procedure, if any, should the ownership interests of the co-depositors in a joint bank account be protected when the government levies upon the entire account to obtain the funds owned by only one co-depositor, the delinquent taxpayer?

In beginning its analysis, the Court is mindful of the distinction between cases involving levy where the ownership interest of the property in question is undisputed and those cases where multiple ownership interests are facially present. The point was well made in the case of *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d at 631, where the court stated:

> It should be pointed out, however, that distraint is a rough and ready remedy. This short cut form

> of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. See United States v. Metropolitan Life Ins. Co., 2 Cir., 1942, 130 F.2d 149. Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.

Where a levied-against bank account is in the taxpayer's name only, it is reasonable that the bank should be required to comply immediately with the demand to surrender the funds. But in the case of a joint account, there is facial evidence of some co-ownership by others, although the actual extent of their undivided ownership interests is not usually known. Thus, the holding and reasoning of the Arkansas Supreme Court in the *Hayden* case makes [*sic*] practical as well as judicial sense.

In these joint account cases, the National Bank of Commerce would require the joinder of the co-depositors in any suit to enforce a levy. This argument presumes, of course, that every time a notice and demand for levy is brought against a joint bank account, the bank will automatically refuse to surrender the funds, thereby defeating the extra-judicial aspect of the levy procedure and forcing the government to bring a lawsuit for enforcement of the levy. The Bank would avoid assuming the burden of proving the ownership interests of the co-depositors in the joint account by requiring that the government name the co-depositors as co-defendants in the enforcement suit.

The government, on the other hand, would require the Bank to surrender the funds levied upon, relying on the presumption of ownership in the taxpayer set forth in *Hayden*. To protect the co-depositors, the government would neither notify them of the levy, name them

as co-defendants in an enforcement suit, nor allow the bank to assert their ownership interests in its defense, but would have them pursue a post-seizure remedy of bringing suit against the government for the return of their proportionate interest in the levied-upon property under 26 U.S.C. § 7426.

This Court sees merit in both of the parties' arguments, but finds that neither side has offered the best legally acceptable solution to this important problem.

At the outset, the levy and distraint proceeding under the Code may involve two parts: (1) the notice and demand of levy, an extra-judicial proceeding, and (2) the enforcement of the levy when the demand is contested, a judicial proceeding. A case such as the one before the Court has already reached the judicial stage, yet the parties argue about the rules that ought to be applied at both stages. The real issue raised is: what should the rules be at the notice and demand stage of the administrative, levy proceeding so as to avoid coming to court altogether?

Pivotal to the resolution of this issue is the interest of the co-depositor in not having his ownership interest in the account erroneously taken by the government. To avoid this, some notice procedure at the levy stage is required. The nontaxpayer co-depositor has a right to some due process of law, which is something more than the post-seizure lawsuit allowed under Section 7426.

Due process is not a concept unrelated to the circumstances of a particular problem. It is a flexible concept which calls for such procedural protection as the particular situation demands. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). What is required under *Mathews* is a three-part analysis in order to determine what process is due. The first requirement is an assessment of the interests of the party whose property is at stake. In the joint bank account situation, there are at least two interested parties, excluding the taxpayer, whose rights are

fully protected by the initial process where it is determined that taxes are due, and by the redemption proceedings under 26 U.S.C. § 6337. There is the co-depositor who does not want his ownership interest in the joint account seized along with that of the taxpayer's. And there is the bank which has an interest in not being placed in the position of deciding who actually owns what portion of the account, thereby facing possible liability to the co-depositor whose ownership interest in the account is mistakenly seized.

The second requirement is an assessment of the government's interest. In this situation, it needs the extrajudicial levy and distraint procedure to be as free as possible from excessive procedural requirements in order to obtain swift and inexpensive collection of delinquent taxes. It also needs a device to "freeze" the account *eo instanti*.

The final requirement is the crux of the due process analysis: what additional procedures, if any, would increase the probability of insuring that no property interest of the co-depositor is taken while at the same time adding minimal burdens upon the government in lawfully seizing property for tax liabilities? Clearly, a full hearing at the levy stage of the procedure would unduly burden the government, although it would insure near perfect accuracy in determining the proper ownership interests in the joint bank account. This Court finds, however, that there is a less burdensome alternative, which it holds to be the minimum due process required in distraint actions against joint bank accounts.

The essential elements of due process are notice and an opportunity to be heard. Therefore, when the Secretary of the Treasury or his agent gives notice to a bank for levy and distraint upon a joint bank account, the bank must immediately freeze the assets of the account and notify the Secretary or his agent of the names of all

co-depositors to the account. The Secretary or his agent must then notify those co-depositors of the levy action, giving them a reasonable (even if brief) time period in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest in the joint account which they claim and the factual and legal basis for that claim. If there is no response from the co-depositors within the required time, the bank must relinquish the funds levied upon and the co-depositors' only remedy, if any, will be to bring a lawsuit for recovery under 26 U.S.C. § 7426. If, however, a response adequately stating a claim is made by one or more of the co-depositors, the Secretary or his agent must determine what portion, if any, of the account belongs to the taxpayer (i.e., is not contested), and the bank must surrender only that portion of the account. During this time, the government's interest will be protected by the freeze initially placed on the account.

If a good faith dispute develops over the ownership interests in the account, as evidenced by the affidavits or other information, the bank can refuse to surrender those funds in the account which are not clearly owned by the taxpayer, and the Secretary or his agent can then bring a suit to enforce the levy, as was done in the present case. At this point, however, due process would require that the government in its suit to enforce the levy name the co-depositors as co-defendants with the bank. The Court would allow the government the presumption that the entire account belongs to the taxpayer, and the codepositors, through either testimony or by affidavits or otherwise, would have to rebut the presumption in accord with *Hayden*. And it is noted, even in-court summary dispositions may be available depending upon the facts and circumstances.

Under this procedure, most levy and distraint demands on joint bank accounts probably will not require

in-court enforcement proceedings. If they do, the majority of them can probably be disposed of by summary judgment based on affidavits from the co-depositors. This procedure will put a minimal burden on the government, while serving to increase the likelihood that only the portion of a joint bank account belonging to the taxpayer is seized. Indeed, in the present state of affairs, the expense to the government is great when it wants to levy upon a joint bank account. The bank refuses to surrender the funds in fear for its own liability, and the government is forced to take the matter directly to court. If the government persuades the bank to surrender the funds, the co-depositors can force the government into court where the burden of proof is then on the government to show that all the funds seized were the property of the taxpayer. *See Flores* v. *United States*, 551 F.2d 1169 (9th Cir. 1977). Again, time and money are spent by the government, defeating the purpose of the distraint statute and diminishing the value of the tax monies ultimately collected.

Although case law on the narrow issue of proper due process protection for co-depositors to a levied-upon joint bank account is virtually nonexistent, there appears to be support for the procedure as outlined by this Court. In the *United States* v. *Stock Yards Bank of Louisville* case, which involved a levy upon jointly owned bonds held by the bank, the court required the government to bring an action to enforce a lien against the bonds and name the joint owners as co-defendants, rather than proceed against the bank by distraint. In the court's words:

> In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all parties fully protected.

This Court does not believe that all distraint actions against joint bank accounts automatically should be required to be converted into lien enforcement actions un-

der 26 U.S.C. § 7403, but the point of this case is well taken with respect to the need for protection of the co-depositors' interest.

In *United States* v. *New England Merchants National Bank*, 465 F. Supp. 83 (D. Mass 1979), a taxpayer's safe deposit box was levied upon and the bank refused to surrender it, contending that the ownership of the contents in the box was unknown. Although the court refused to require the joinder of the *taxpayer* in the enforcement suit, it did allow the bank to present the defense of ownership interests by possible third parties having an interest in the contents of the box. However, no evidence by the bank was offered (even by way of court-suggested affidavits) that other parties had an ownership interest in the contents of the box, and therefore summary judgment was granted to the government.

This Court finds the rationale of the district court of Massachusetts with respect to a safe deposit box and the defense of ownership by third parties to be relevant to cases involving joint bank accounts. The court stated:

> The ownership issue in a case involving seizure of contents of a safe deposit box is relatively simple, and the available evidence is limited. Moreover, because the United States possesses the key to the safe deposit box, the taxpayer is unable to purloin its contents. The need for rapid action, thus, is not as pronounced as in some other cases.

465 F.2d at 88.

Nevertheless, this Court takes the holding of the Massachusetts court a bit further by requiring the government to *either* notify the co-depositors of the levy on the joint account and give them an opportunity to present any claims of separate ownership interests during the administrative "levy" proceedings *or* join them as co-defendants with the bank in an enforcement action

on the levy, thereby insuring that a full and fair determination of the ownership interests in the joint account can be made. This minimal burden of notice and/or joinder more properly belongs on the government than the bank in a joint account case because the account itself presents prima facie evidence of ownership interests other than that of the taxpayer. Furthermore, the government is protected by the freeze on the funds in the joint account, and the ultimate evidence of ownership interests in the account is relatively easy to obtain, e.g., by affidavit. Finally, the government enjoys the presumption that the taxpayer owns all funds in the joint account.

Having set forth the due process requirements necessary in cases involving levy and distraint action upon joint bank accounts made pursuant to 26 U.S.C. §§ 6331 and 6332, the Court must now resolve the dispute before it.

The Court holds that the case must be dismissed in order to allow the government an opportunity to obtain the tax funds it seeks through the administrative, extra-judicial levy procedure as defined by section 6331 and in accord with the due process procedures as outlined in the opinion. What the Secretary or his agents must do then to obtain the funds sought from the joint bank account is to notify Ruby Reeves and Neva R. Reeves informing them that a levy of $856.61 has been made on the joint bank accounts to which they are co-depositors and that they have a certain (reasonable) time in which to notify both the designated government agent and the bank of any claim of an ownership interest in the joint account, the dollar amount of such claim, and the legal and factual basis therefor. If no response is made within the required time, the Bank must surrender the $856.61 to the government. If however, any adequate bona fide claim of separate ownership is made, the Bank need only surrender that

portion of the funds in the joint account that is uncontested, i.e., is in excess of the total amount of such other bona fide claims. If an ownership claim is without any stated factual or legal basis, the Bank must consider those funds as part of the account deemed owned by Roy Reeves and surrender them accordingly. If, however, the Bank believes that a genuine dispute exists as to the legality of any ownership claim made by Ruby or Neva Reeves, it may refuse to surrender any portion of the funds so claimed. At that point the government may bring suit to enforce the levy on the contested funds but must name as defendant(s) along with the Bank the co-depositor(s) actually claiming some ownership interest in the joint account.

It is therefore Ordered that the case be, and it is hereby, dismissed as premature in order to give the government an opportunity to obtain the tax funds sought pursuant to section 6331 and in some manner not inconsistent with this opinion.

Dated this 14th day of December, 1982.

/s/ Garnett Thomas Eisele

GARNETT THOMAS EISELE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1218EA

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

Appeal from the United States District Court
for the Eastern District of Arkansas

JUDGMENT

This appeal from the United States District Court for the Eastern District of Arkansas was submitted on the record of the said District Court and briefs of the parties.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

JANUARY 31, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1983

83-1218-EA.

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

Appeal from the United States District Court
for the Eastern District of Arkansas

The Court, having considered appellant's petition for rehearing with suggestion for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing with suggestion for rehearing en banc denied.

APRIL 30, 1984

APPENDIX E

Internal Revenue Code of 1954 (26 U.S.C.), as amended and as in effect for the years at issue:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to

property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * *

(c) *Enforcement of Levy.*—

(1) *Extent of personal liability.*—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at an annual rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) *Penalty for violation.*—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) *Effect of Honoring Levy.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon

which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

* * * * *

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing apparel and school books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, provisions, furniture, and personal effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $1,500 in value;

(3) *Books and tools of a trade, business, or profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $1,000 in value.

(4) *Unemployment benefits.*—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) *Undelivered mail.*—Mail, addressed to any person, which has not been delivered to the addressee.

(6) *Certain annuity and pension payments.*—Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) *Workmen's compensation.*—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) *Judgments for support of minor children.*—If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) *Minimum exemption for wages, salary, and other income.*—Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

* * * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy

other than the property specifically made exempt by subsection (a).

* * * * *

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) or 6166A(h) shall be treated as a neglect to pay tax.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

SEC. 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) *Actions Permitted.*—

(1) *Wrongful levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

* * * * *

Ark. Stat. Ann. (1980):

67-521. *Deposits in two or more names.*—When a deposit shall have been made in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit and any additions thereto made by any of the persons named in the account, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

* * * * *

67-552. *Accounts and certificates of deposit in two or more names.*—Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:

* * * * *

(d) If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein

shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit].

* * * * *

(h) The person to whom such account or certificate of deposit is issued may pledge, withdraw or receive payment and any such payment made by the banking institution shall be a complete discharge as to the amount paid.